

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES WARD)	
Claimant)	
)	
VS.)	
)	
DUCKWALL ALCO STORES, INC.)	
Respondent)	Docket No. 1,024,992
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 29, 2010 Post-Award Medical Order by Administrative Law Judge Brad E. Avery (ALJ).

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Meredith Mosier, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Order.

ISSUES

After considering the parties' evidence the ALJ granted claimant's request for the designation of Dr. Short as the treating physician, a finding that is not in dispute for purposes of this appeal. The ALJ did, however, deny claimant's request for reimbursement of \$3,829.24 in copays for medications as he concluded that claimant's request was untimely under K.S.A. 44-510k(b).

Claimant requests review of the ALJ's denial of his request for reimbursement. Claimant contends the plain language of K.S.A. 44-510k(b) allows for the Court to award medical treatment relating back to the entry of the underlying award and up to six months *following* the application for post-award medical treatment. Thus, claimant maintains the Board should reverse the ALJ's Post-Award Medical Order and direct respondent to reimburse claimant for his prescription costs back to May 17, 2007, the date of the underlying award through January 27, 2010, six months following the date he filed his application for post-award medical treatment.

Respondent asserts that the ALJ's Order should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The ALJ's Post-Award Medical Order adequately and succinctly sets out the salient facts necessary to this appeal. Rather than restate those facts, the Board merely adopts that statement as its own.

The decisive issue in this appeal is the timeliness of claimant's request for reimbursement of costs incurred in obtaining pain medications causally related to his work-related accident. K.S.A. 44-510k(b) provides in pertinent part as follows:

(B) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superceded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. *The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment.* (emphasis added)

As the ALJ notes, "[t]he plain language of [the] statute would seem to indicate the filing of the post award medical application would begin to date Mr. Ward's right to claim medical expenses related to his accidental injury."¹ Indeed, that is precisely what claimant argues here. According to claimant -

K.S.A. 44-510k(b) specifically says "six months *following* the filing of such application for post-award medical treatment" Given the recent views expressed

¹ ALJ Order (Mar. 29, 2010) at 2.

by the Kansas Supreme Court in the *Casco*²] decision and its progeny, workers compensation statutes are to be strictly construed based on their plain language. The Court should give effect to the statute's express language rather than attempting to determine what the law should or should not be. Therefore, the limitation expressed in the statute is for treatments six months following the filing of the post-award medical treatment application, rather than six months preceding such filing. It is [c]laimant's position that this provision was intended to prevent a [c]laimant from filing an application for post-award medical, then getting three years worth of treatment prior to scheduling a hearing on its application.³

The Board has previously considered the language in K.S.A. 44-510k(b) and although the Board's opinion indicated the statute contained a "typographical error",⁴ it is more appropriate to say that the statute contains rather inartful language. When read in its entirety, the clear import of the statute was to provide a process for an injured employee to request post-award medical benefits. The statute mandates that these post-award requests are to receive priority settings over all requests (other than preliminary hearing requests). Obviously, the intent is to fast-track these requests and give both claimant (who is seeking treatment) and the respondent (who may be required to bear the expense of the treatment) an opportunity to be heard as quickly as can be accomplished. This serves not only the concerns of the claimant (and his or her desire for prompt and effective treatment) but respondent's rights and obligation to provide that treatment. Moreover, this interpretation is wholly consistent with the provisions of K.S.A. 44-528 which govern the modification of an award:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, *except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.* (emphasis added)

It strains credulity to suggest, as claimant has, that this statute should be read in such a way so as to allow a claimant to file a request for post-award medical benefits which would encompass the entire period from the date the award was originally entered until the time 6 months *after* the date that post-award request was filed. Were that to be the case, then a claimant could, without any notice to respondent, proceed to undertake medical treatment in the unilateral belief that it will be found to be authorized (as this claimant purports to have done). And then, when convenient and possibly even years later, file a request for post-award medical benefits under K.S.A. 44-510k. Under claimant's version

² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

³ Claimant's Brief at 7 (filed Apr. 16, 2010).

⁴ *Thomas v. Thomas Sign Company*, No. 1,001,120, 2005 WL 831901 (Kan. WCAB Mar. 18, 2005).

of the statute, the filing of the post-award application merely *begins* the 6 month period, rather than ending the 6 month period.

The Board concludes that claimant's interpretation is wholly inconsistent with the Board's earlier finding that the statute contemplates medical treatment incurred in the 6 month period *before* the filing of the post-award request for medical treatment. This interpretation is consistent with the statute's use of the words "relate back" as opposed to forward. Moreover, this interpretation is also consistent with the statutory scheme that is mirrored in K.S.A. 44-528. The Board finds that its earlier interpretation of K.S.A. 44-510k is accurate. Accordingly, the ALJ's Post-Award Medical Order is affirmed in all respects.

Claimant requested the Board address the issue of attorneys fees. That issue was not brought before the ALJ and will not be considered on appeal. If claimant desires to pursue that matter, he may do so through the appropriate method before the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Medical Order of Administrative Law Judge Brad E. Avery dated March 29, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Meredith Moiser, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge